No. 230.
Brf. of Quarles & Lines for pltf. in E.

Office Supreme Court U.S.
FILED
MAR 19 1901
JAMES H. McKINNEY,
Clerk.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS

Filed Mar. 19, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,

Plaintiffs in Error,

vs.

PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

(17,689.)

JAMES W. FOWLER,
FRED. H. WHITFIELD,
CHARLES QUARLES,
Of Counsel.

JOSEPH V. QUARLES,
GEORGE LINES,
Counsel for Plaintiffs in Error.

The Edw. Keogh Press, Broadway, Milwaukee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, ET AL.,

Plaintiffs in Error,

vs.

PATRICK McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

The five grounds upon which defendant in error asks a dismissal of this cause present but three propositions, viz:

1. That it does not appear from the record that the plaintiffs in error specially set up and claimed in the state court a title, right, privilege or immunity under the constitution or statutes of the United States;

2. That the assignments of error are insufficient because no reference is therein made to any statute of the United States under which the plaintiffs in error claimed any title or right in the state court; and

3. That the state court based its decision on grounds independent of any federal question.

Neither in the statement of the grounds upon which this motion is based, nor in the argument of counsel for defendant in error in its support, is it denied that a federal question was, in fact, presented to and passed upon by the state court. On the contrary, it is, at least impliedly, admitted that fed-

eral questions are involved and were decided by the state court.

Anticipating that a motion to dismiss might possibly be made, we have in our brief upon the merits, already filed, discussed to some extent the question of the jurisdiction of this court to review the judgment to which this writ of error is directed, and shall here confine ourselves to replying to the argument of counsel for defendant in error in support of the motion to dismiss, begging leave to refer to our brief upon the merits in support of and to supplement the argument herein made.

I.

It does appear in the record that plaintiffs in error specially set up and claimed in the court below a title, right or privilege under the statutes of the United States.

In *Armstrong vs. Athens County, 16 Peters, 281*, six modes are pointed out in which it may appear that a right under a federal statute was claimed and passed upon in a state court, so as to give this court jurisdiction to review the decision of such state court by writ of error. The first is: "Either by express averment, or by necessary intendment in the pleadings in the case;" and the sixth, if it "appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which they passed without deciding it." We maintain that in this case it appears in both of these modes that the plaintiffs in error set up and claimed a right, title or privilege under the statutes of the United States governing the disposition of mineral lands.

A. In his complaint defendant in error alleged that he was the owner and entitled to the possession of an undivided one-quarter interest in and to the Holy Terror and Key Stone No. 4 lode claims. The character and sourse of his title is not stated, but it is alleged that the Holy Terror and Key Stone No. 4 claims were formerly located and known as the Tin Bar No. 1 and Tin Bar No. 2 lode claims respectively. (Record pages 15-16.)

In their amended answer the plaintiffs in error, for a third defense, make the following allegations:

"1. These defendants allege upon information and belief that the plaintiff expects and intends to establish his allegations of ownership or estate in and to the said Holy Terror Lode claim set forth in his complaint by proving or attempt-

ing to prove upon the trial of this case that the land now covered by the said Holy Terror Lode claim or some portion thereof was formerly located on the 25th day of January, 1888, under and by the name of the Tin Bar No. 1 Lode claim by Jacob F. Reed, William Franklin, Thomas C. Blair and Frank Eaton, and by proving or attempting to prove that the plaintiff thereafter acquired some interest or estate in and to the said Tin Bar No. 1 location and thereby became a tenant in common of said claim with the other locators thereof, and by proving or attempting to prove that the said Tin Bar No. 1 location was at all times thereafter a valid and subsisting mining location and was a valid and subsisting mining location at the time of the location of the said Holy Terror Lode claim, to the extent at least that the plaintiff is vested with some interest or estate in and to said subsequent location.

2. These defendants allege that if the said Tin Bar No. 1 Lode claim was a valid and subsisting lode claim in its inception, which the defendants deny, that no assessment or development work was ever done by the locators and owners thereof or any one for them during the years subsequent to the said pretended location in the year 1888, and that the said pretended Tin Bar No. 1 Lode claim and the whole thereof was forfeited and abandoned at and prior to the location of the said Holy Terror Lode claim on the 28th day of June, 1894, as hereinafter alleged.

3. That the said locators and owners of the said pretended Tin Bar No. 1 Lode claim failed to do the assessment or development work thereon required by law for the years 1889, 1890, 1891 and 1892 and 1893, and abandoned the same, and thereafter the defendant William Franklin peaceably entered upon the said ground and duly made a discovery thereon of mineral-bearing rock in place carrying gold and other valuable minerals; and on or about the 28th day of June, 1894, by the name of William B. Franklin, he duly located and appropriated the same under and by the name of the Holy Terror Lode claim, and thereafter marked the surface boundaries of the same upon the ground with eight substantial stakes, as required by law, and duly recorded the location certificate thereof in the office of the register of deeds in and for Pennington County, South Dakota, and did and performed all the said acts of location within sixty days after the date of his said discovery and within the time required by law; that the other defendants herein have since acquired an interest in and to the said Holy Terror location by purchase from the said William Franklin." (Record pages 17-18.)

For a fourth defense, similar allegations are made respecting the location of the Tin Bar No. 2 claim, the failure to perform work thereon, and the location of the Key Stone No. 4 claim. (Record pages 18-19.)

These allegations of the answer may be inartistic in form, but there can be no doubt as to the meaning of the pleader, or the grounds upon which it was intended to defend against the claim of title asserted by defendant in error. It is alleged in substance, (1) that defendant in error claimed title to an interest in the land in controversy under and by virtue of the location of the Tin Bar claims; (2) that because of failure to perform the development work required by law, both the said Tin Bar claims had become forfeited and abandoned prior to the location of the Holy Terror and Key Stone No. 4 claims; and (3) that the said Tin Bar claims, having become so forfeited and abandoned, and the ground covered thereby open to relocation, the plaintiffs in error, or their predecessors in title, located the Holy Terror and Key Stone No. 4 claims, including therein the ground in controversy.

It is true, that no specific reference is made to the statutes of the United States, but the facts are pleaded which show that the defendants in the court below claimed title to the premises in dispute as being embraced within valid mining claims, located pursuant to the laws of the United States, and that they denied the title of the plaintiff in the court below, which, as alleged, rested solely upon mineral locations, on the ground that those locations had become forfeited and abandoned by failure to comply with the conditions prescribed by the laws of the United States. This is a sufficient claim of a right, title or privilege under the federal statutes. Facts being stated presenting a case within the purview of a federal statute, and clearly showing an intent to claim its protection, it was not necessary to make a direct assertion of such intention or more particularly designate the statute relied upon.

The phrase "specially set up or claimed" used in section 709 R. S., does not mean that the particular section of the constitution, treaty or statutes need be set out at length, or designated by number or in any particular manner. It means merely that it must appear, unmistakably, that the party intends to invoke, for the protection of his rights, a provision of the constitution, a treaty or a statute.

Oxley Stave Co. vs. Butler County, 166 U. S., 648-655.

Doubtless the pleadings should be sufficiently definite to indicate the particular act of congress or part of the constitu-

tion upon which it is intended to rely, but, as said in *Bridge Proprietors vs. Hoboken Company, 1 Wall., 116-143*, "It has never been held that this should be done in express words."

In the case just referred to, it was contended that because the pleadings did not, in words, say that a statute was void because in conflict with the constitution of the United States, and did not point out the special clause of the constitution supposed to render the act invalid, the question of its invalidity was not sufficiently raised. In answer to this contention, Mr. Justice Miller uses the following language:

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court can surely recognize the fact without requiring the pleader to say in words, 'This paragraph of the constitution is the one involved in this case.'"

1 Wall., 142.

In an earlier case, where all the prior decisions were reviewed in an opinion by Mr. Justice Story, that learned judge, after stating that to give this court jurisdiction of a case brought by writ of error from a state court, it must appear that a federal question was raised and decided by the state court, said:

"That it is not necessary that the question should appear on the record to have been raised, and a decision made in direct and positive terms, *ipsissimis verbis;* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment."

Crowell vs. Randell, 10 Pet., 368-398.

"No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

Green Bay, etc., Canal Co. vs. Patten Paper Co., 172 U. S., 58-67.

B. But if it were doubtful whether the pleadings show a right, title or privilege specially set up or claimed under the United States statutes, it is certain that upon the whole record it appears that a federal question was raised by the plaintiffs in error and decided against them.

The material facts as shown by the findings of the trial court are, that in 1882, Jacob F. Reed and William Franklin located the Reed Placer claim; they remained in the actual and undisputed possession, and having complied with all the requirements of the law respecting such claims, made application for a patent therefor in November, 1892, and final entry in March, 1893. In January, 1888, Reed and Franklin, together with Thomas C. Blair and Frank Eaton, located the Tin Bar No. 1 claim, covering in part the same ground as the Reed Placer, the alleged discovery point being within the limits of the Reed Placer. In the same month Blair and Eaton located the Tin Bar No. 2 claim, covering part of the ground embraced in the Reed Placer, the alleged discovery point being outside the boundaries of the Reed Placer. In 1888, the defendant in error acquired a undivided ¼ interest in both the Tin Bar claims, and in 1890, Blair and Eaton conveyed to Franklin and Reed interests in the Tin Bar No. 2 claim. The development work required by section 2324 R. S., was not performed upon either of the Tin Bar claims in any year. In June and September, 1894, Franklin located the Holy Terror and Key Stone No. 4 claims, the former embracing 1.62 acres of the land covered by the Tin Bar No. 1 claim, and the latter embracing 2.71 acres of the land covered by the Tin Bar No. 2 claim. (Record pages 22-25.)

No other claim of title was shown or asserted by defendant in error to an interest in the land in controversy except such as he derived under and by virtue of the interest acquired by him in 1888 in the Tin Bar locations. His claim of title was exactly that which the defendants in the court below asserted in their answer it would be.

The supreme court of South Dakota sustained the claim of defendant in error to an interest in the land in controversy, upon the theory that at the time Franklin located the Holy Terror and Key Stone No. 4 claims in 1894, the relation of co-tenancy existed between him and the defendant in error in respect to the Tin Bar claims, and that by reason of this relation, the locations made by Franklin inured to the benefit of defendant in error, so far as they covered the ground embraced in the Tin Bar claims. To reach this conclusion, the supreme court of South Dakota necessarily had to decide, and as its opinion show did decide, that in 1894, when Franklin located the Holy Terror and

Key Stone No. 4 claims, the Tin Bar claims had not become forfeited or abandoned by the failure to perform thereon the work required by statute, but that they still existed and the locators, or their grantees, by virtue thereof, had an interest or estate in the land,—that is, that they were then property in the ownership of which the relation of co-tenancy might exist.

The opinions of the supreme court of South Dakota show that that court fully realized the necessity of first determining that the Tin Bar claims existed in 1894 as a foundation for its conclusion that Franklin and defendant in error were co-tenants in the ownership thereof. That court was not guilty of the absurdity of deciding that there could be a co-tenancy where there was no estate.

In its first opinion, after holding that the parties to this action were estopped to deny the validity of the Tin Bar locations, and that the rules of law applicable to co-tenants applied to the co-owners of mining claims, the supreme court of South Dakota said:

"Therefore, the only question to be determined in this action is whether the relation of co-tenants existed between the plaintiff (defendant in error) and Franklin when the latter located the Holy Terror and Key Stone claims." * * * "Actual possession of the claim is not essential to the validity of the title obtained by a valid location, and until such location is determined by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the location thereof." * * * "Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute and involves only the question whether the terms of the law have been complied with. Lapse of time, absence from the ground, or failure to work a claim for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Original locators may resume work at any time before relocation. Forfeiture is not complete until some one else has appropriated the property." * * * "*Plaintiff and Franklin continued to be co-tenants so long as the Tin Bar claims continued to exist; they continued to exist until the ground was relocated, and during every instant of that time the latter was in law incapable of performing any act in hostility to his co-tenant in reference to the joint estate.*" (Record page 38.)

It is too plain to admit of controversy that resort must be had to the federal statutes to determine whether the locator of a mining claim who has defaulted in the performance of

the required annual work continues to have a right, title or interest in the ground covered by such claim; and whether such claim still exists as property notwithstanding such default. Manifestly these are purely federal questions. That the supreme court of South Dakota considered that a federal question was involved is also certain, for further on in the opinion above quoted from, and after holding that the Tin Bar claims and the relation of co-tenancy in the ownership thereof existed at the time Franklin located the Holy Terror and Key Stone claims, that court said: "This conclusion is not precluded by the language of the federal statutes." (Record page 38.)

From these quotations it unmistakably appears that there was actually presented to and passed upon by the state court the question whether the locators of a mining claim who have failed to comply with the conditions imposed by the statutes of the United States have any right, title or interest in the land covered by the claim,—a question, the answer to which depends solely upon the construction of the federal statutes.

In the opinion it is also stated that the plaintiffs in error claimed "that the Tin Bar No. 1 discovery notice was posted within the boundaries of the then subsisting unpatented Placer claim, and that if the Tin Bar location was originally valid, the claim ceased to exist when the placer claim was patented." (Record page 36.) It being found as a fact in the case, that at the time application for patent and final entry of the Reed Placer claim were made, there were no lodes or veins known to exist upon that portion of it lying within the boundaries of the Tin Bar claims of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development (16th finding, Record page 24), this contention of the plaintiffs in error clearly raised another question determinable only by the provisions of the United States statutes governing the location of mining claims, and this question also was decided by the state court against the contention of the plaintiffs in error.

To give this court jurisdiction to review the decision of a state court under section 709 R. S., it is sufficient if it appear upon the whole record that the adjudication of one of the class of questions mentioned in that section was necessarily involved in the disposition of the case by the state court and was decided against the party seeking a review; and it is not necessary that this should appear in express terms, either in the opinion of the state court or elsewhere, if the whole

record shows that the state court could not have reached the conclusion it did without deciding such a question.

Willson vs. Blackbird Creek Marsh Co., 2 Pet., 245.
Armstrong vs. Athens County, 16 Pet., 281.
Chicago Life Ins. Co. vs. Needles, 113 U. S., 574.
Eureka Lake Co. vs. Yuba County, 116 U. S., 410.
Kaukauna Co. vs. Green Bay, etc., Canal Co., 142 U. S., 254-269.
Roby vs. Colehour, 146 U. S., 153.
Chicago, etc., Railroad vs. Chicago, 166 U. S., 226.
Missouri, etc., Ry. vs. Haber, 169 U. S., 613.

While we maintain that in this case the pleadings and the opinion of the supreme court of South Dakota do show explicitly that questions of the kind mentioned in section 709 R. S. were raised and decided in the state court, it is respectfully submitted that if this be not the case, it is apparent from the whole record that the state court could not have rendered its decision without passing upon such questions.

II.

The assignments of error are sufficient.

Though it were true, as alleged in the second ground upon which the motion to dismiss is based, that the assignments of error attached to and sent up with the writ made no reference to any statute of the United States under which the plaintiffs in error claim a right and title, this would afford no ground for dismissal. A writ of error will not be dismissed even if no assignment of errors at all is sent up with the writ.

School District of Ackley vs. Hall, 106 U. S., 428.
Gumbel vs. Pitkin, 113 U. S., 545.
United States vs. Pena, 175 U. S., 500.

But the assignments of error do refer with certainty to the statutes of the United States, the protection of which was claimed by plaintiffs in error.

The third assignment of error reads as follows: "That the said circuit court of Pennington County in rendering and entering said judgment, and the supreme court of the state of South Dakota in determining said cause and directing the entry of said judgment, erred in this, to-wit: that both in the pleadings in said case and upon the trial thereof in said cir-

cuit court of Pennington County, and in the supreme court of the state of South Dakota, it appeared and was averred and so determined, and appears in the findings of fact herein, that at a date prior to the time of the application for patent to the said Reed Placer mining claim, to-wit, the 23rd of November, 1892, there were no known lodes or veins upon said Reed Placer mining claim within the boundary lines of said Tin Bar No. 1 and Tin Bar No. 2 locations of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploration or development; that no adverse was filed by the owners of said Tin Bar No. 1 and Tin Bar No. 2 locations to the said application for patent for the said Reed Placer mining claim; that in said application for patent for the said Reed Placer mining claim there was no application for patent for any lode or veins included therein, and it was contended by these defendants in the said circuit court of Pennington County, and in the said supreme court of the state of South Dakota, that *under the statutes of the United States relating to mining claims*, by reason of said facts and of the making of the final entry of said Reed Placer mining claim and the issuing of the patent therefor, all rights of the owners of the said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim became and were barred and lost, yet the said circuit court of Pennington County and the said supreme court of the state of South Dakota decided against said contention of these defendants and said judgment depends upon and is based upon said decision." (Record pages 9-10.)

In the fourth assignment it is alleged for error, that although it was alleged in the pleadings and found as a fact upon the trial, that the locators of the Tin Bar claims "failed and neglected to perform the work on the mining claims required by the statutes of the United States relating to mining claims, and it was contended by defendants that *under the statutes of the United States relating to mining claims*, by reason of the failure of the locators of said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim to perform thereon *the work required by the statutes of the United States*, the said Tin Bar No. 1 Lode claim and the Tin Bar No. 2 Lode claim had become and were abandoned, null and of no effect, prior to the location of the Holy Terror Lode claim and prior to the location of the Key Stone No. 4 Lode claim, yet the said circuit court of Pennington County and the said supreme Court of the state of South Dakota decided against said contention of these defendants, and that said judgment depends upon and is based upon said decision." (Record page 10.)

In the fifth, that the state courts "erred in holding and deciding, contrary to the contention of said defendants then and there made, that *under said statutes of the United States* the location of said Holy Terror Lode claim was invalid as against the grantor of the plaintiff." (Record page 10.)

In the sixth, that the state courts "erred in holding and deciding, contrary to the contention of said defendants, then and there made, *that under said statutes of the United States* the location of said Key Stone No. 4 Lode claim was invalid as against the grantor the plaintiff." (Record page 11.)

In the seventh, that the state courts "erred in holding and deciding, contrary to the contention of said defendants then and there made, that *under the said statutes of the United States* the said Tin Bar No. 1 Lode claim was at the time of the location of the Holy Terror Lode claim a valid and subsisting mining claim." (Record page 11.)

In the eighth, that the state courts "erred in holding and deciding, contrary to the contention of the said defendants then and there made, that at the time of the location of the said Key Stone No. 4 Lode claim the said Tin Bar No. 2 Lode claim was, *under said statutes of the United States*, a valid and subsisting mining claim." (Record page 11.)

It will be seen that all of these assignments of error refer explicitly to the "*statutes of the United States relating to mining claims*" as the foundation upon which the plaintiffs in error based their denial of the claim asserted by the defendant in error, and upon which they rested their own claim of title to the ground in controversy. The brief of counsel for defendant in error in support of this motion fails to point out any defect in these assignments. The only possible criticism that we can think of is that they do not either quote the statutes of the United States referred to, or designate the particular section by number, but this, as has been shown, is wholly unnecessary. It certainly can not be claimed that there is any vagueness or indefiniteness in the reference to the statutes, or that either the court or counsel could possibly be misled.

III.

The case was not decided upon grounds independent of Federal questions.

It may be true that in determining whether the Tin Bar claims were valid in their inception, the supreme court of South Dakota did base its decision upon the ground that plaintiffs in error were estopped to allege their invalidity,

and did not pass upon the question whether those claims were invalid under the statutes of the United States because in conflict with the Reed Placer claim.

No other question, however, was decided upon the ground of estoppel. Counsel for defendant in error are mistaken in stating in their brief (page 11) that the South Dakota court also decided the question whether the Tin Bar No. 1 claim became void by the patenting of the Reed Placer upon this ground. The decision upon that point was squarely placed upon the provisions of the federal statutes, as the following quotation from the opinion will show: "If the Tin Bar claims were located when the application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer patent. *Noyes vs. Mantle, 127 U. S., 348: Iron S. M. Co. vs. Mike & Starr G. & S. M. Co., 12 Sup. Ct. Rep., 543.*" (Record pages 36-7.) It is plain from this quotation that the court's ruling was based on the provisions of section 2333 R. S. The difficulty with the ruling is that it altogether ignores the fact expressly found by the trial court that at the time of the application for the placer patent there were no known lodes or veins within the boundaries of the Tin Bar claims. For this reason error is assigned upon the ruling and is discussed in our brief upon the merits.

It has been already pointed out that underlying the application made by the state court to the facts of this case of the rules of law governing the rights of co-tenants, is the question whether at the time the Holy Terror and Key Stone claims were located, the Tin Bar claims had any existence,—a question solely dependent upon the federal statutes, and which the state courts must have decided against the contention of plaintiffs in error before reaching the question of co-tenancy. And we have attempted to show that this issue not only was raised by the pleadings, but was directly passed upon by the state courts. What has already been said on that subject is pertinent here and need not be repeated.

If it were true, as contended by counsel for defendant in error, that the supreme court of South Dakota had ignored the federal questions and had clearly declared that they decided the case upon other grounds, that would not affect the jurisdiction of this court, since the federal questions are in the case and can not be gotten rid of by passing them over in silence or by declaring that they are not involved.

Chapman vs. Goodnow, 123 U. S., 540-8.
Chicago Life Ins. Co. vs. Needles, 113 U. S., 574-9.
Roby vs. Colehour, 146 U. S., 153-9.

Chicago, etc., Railroad vs. Chicago, 166 U. S., 226-231.
Anderson vs. Carkins, 135 U. S., 483-5.
Missouri, etc., Ry. vs. Haber, 169 U. S., 613-622.

"If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Chapman vs. Goodnow, *supra.*

"It is immaterial that the state court considered the case to be within the provisions of certain state statutes. The grasp of the federal statute must first be released. The construction and scope of that are federal questions, in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court."

Anderson vs. Carkins, *supra.*

It is respectfully submitted that the motion to dismiss should be denied.

JOSEPH V. QUARLES,
GEORGE LINES,
Counsel for Plaintiffs in Error.

JAMES W. FOWLER,
FRED H. WHITFIELD,
CHARLES QUARLES,
Of Counsel.